Nos. 83-1065, 83-1240

In The

Supreme Court of the United States

October Term, 1983

THE COUNTY OF ONEIDA, NEW YORK AND THE COUNTY OF MADISON, NEW YORK,

Petitioners,

vs.

THE ONEIDA INDIAN NATION OF NEW YORK STATE, A/K/A The Oneida Nation of New York, A/K/A The Oneida Indians of New York; THE ONEIDA INDIAN NATION OF WISCONSIN, A/K/A The Oneida Tribe of Indians of Wisconsin, Inc.; and THE ONEIDA OF THE THAMES BAND COUNCIL,

Respondents.

BRIEF OF RESPONDENTS ONEIDA INDIAN NATION OF WISCONSIN AND ONEIDA INDIAN NATION OF NEW YORK

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MISCELLANEOUS

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STATEMENT OF THE CASE

From time immemorial until 1795, the Oneida Nation occupied the real property that is the subject of this suit. This property, part of the Oneida Nation's aboriginal territory, was secured to it by federal treaties in appreciа-

tion for the invaluable assistance given the United States by the Oneida Nation during the Revolutionary War. Treaty of Fort Stanwix, Oct. 22, 1784, 7 Stat. 15; Treaty of Fort Harmar, Jan. 9, 1789, 7 Stat. 33. A smaller part of Oneida territory, including the subject land, was recognized as Oneida property by the United States in a third treaty. Treaty of Canandaigua, Nov. 11, 1794, 7 Stat. 44. In 1795, the State of New York purported to purchase the subject property without the consent of the United States in violation of the 1793 Indian Trade and Intercourse Act, 1 Stat. 329 (referred to hereinafter as the 1793 Act). 434 F. Supp. 527, 533-35.

In 1970, the Oneida Indian Nations of New York and Wisconsin filed this action based on the 1793 Act and federal treaties challenging the 1795 transaction. They were joined later in the proceeding by the Oneida of the Thames Band. The Oneida plaintiffs (hereinafter the Oneidas) sued only Madison and Oneida Counties, New York (hereinafter the counties) and sought only two years' trespass damages for the 871.92 acres occupied by them as successors to New York State. No private parties were sued and eviction was not sought.

The district court dismissed the suit for lack of federal question jurisdiction and in a split decision the Court of Appeals for the Second Circuit affirmed. 464 F.2d 916 (Lumbard, J., dissenting). This Court reversed in a unanimous decision, holding that federal question jurisdiction here rests on the "not insubstantial claim" that federal law protects the Oneidas' interests in the subject land. 414 U.S. 661, 666 (hereinafter *Oneida* I).

On remand, the counties filed third party complaints against New York State (hereinafter the state), seeking

indemnity for any trespass damages that might be awarded against them. The district court divided the case into three separate proceedings: the first on the counties' liability to the Oneida tribes, the second on the amount of damages owed if any by the counties to the Oneidas, and the third on the counties' claim for indemnity from the state.

After trial on the primary liability issue, the district court held that the three tribal plaintiffs were the political successors to the Oneida Nation and had not abandoned the claim. 434 F. Supp. at 532, 541. The court concluded that the state had violated the 1793 Act, that the transaction was, as a result, void, and that the counties as the state's successors in interest had illegally occupied Oneida land. *Id.* at 540.[1] The counties raised a number of defenses such as laches and adverse possession all of which were rejected by the district court. *Id.* at 541-43.

The district court then tried the damages issue and held the counties liable to the Oneidas for $16,654.00, plus interest, in total trespass damages, allowing the counties an offset for claimed good faith occupancy. On the remaining issue—the counties' third party claim against the state—the district court held the state liable to indemnify the counties for the full amount of the Oneidas' judgment. J.A. 188a-199a.

On appeal, the Second Circuit affirmed the district court's judgment with one exception. 719 F.2d 525. Finding that the counties had not proffered evidence of their

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[1]The district court based its liability finding on the statute and did not reach the Oneidas' treaty claim. 434 F. Supp. at 537, n.19. That claim remains unadjudicated.

claimed good faith occupancy for the two years in question, the court of appeals remanded the good faith issue to the district court for clarification. *Id.* at 542. The remand was stayed pending this Court's consideration of the counties' and state's petitions for certiorari.[2] On March 19, 1984, the Court granted both petitions and the good faith issue remains undetermined.

SUMMARY OF THE ARGUMENT

In large part, the questions raised in the petitions for certiorari are answered by recent decisions of this Court and acts of Congress. In *Oneida* I the Court examined the nature of the Oneidas' claim. It held that for purposes of federal question jurisdiction the Oneidas asserted a federally protected property right arising from uncodified principles of federal law, federal treaties and statutes. 414 U.S. at 667-68, 678. The Court further determined that, with respect to any issue here not governed by federal statute, the "rule of decision would be fashioned by the federal court in the mode of the common law." *Id.* at 674. The Court's reasoning plainly suggests the existence of a federal common law and statutory right of action in the Oneidas.

The suggestion in *Oneida* I that tribes could sue on federal common law and statutory actions to protect tribal land became the implicit holding in *Wilson v. Omaha Indian Nation*, 442 U.S. 653 (1979). Invoking the same sort of federal protections as had the Oneidas, the Omaha Tribe

[2]Since the counties abandoned both the laches and abandonment defenses on appeal, the court of appeals did not consider those issues. The counties raised only the four issues that were the subjects of their petition for certiorari, *i.e.* availability of federal common law remedies, the existence of a statutory right of action, the statute of limitations bar, and justiciability.

sued to quiet title. *Id.* at 659-661. The Court reviewed the tribal claim on its merits and, referring to the principles set out in *Oneida* I, upheld the cause of action and the tribe's right to relief. *Id.* at 670-71. Thus, in *Wilson* the Court tacitly held that tribes have a right of action under federal common law and statutory law to protect tribal lands.

Congress has confirmed the availability of relief on tribal claims respecting land. In the Indian Trade and Intercourse Acts, Congress codified the principle that tribal lands cannot be alienated without the United States' consent (referred to herein as the nonintercourse provision). In 1822, Congress enacted a statute allocating the burden of proof in land disputes between tribes and non-Indians. *See* 25 U.S.C. §194. In 1966, Congress provided that tribes shall have access to federal court in such suits. *See* 28 U.S.C. §1362. Since 1966, Congress has passed a number of statutes of limitation dealing with damages in such suits and specifically exempting title claims. *See* 28 U.S.C. §2415. Section 2415 is applicable here and, thus, precludes adoption of a state statute of limitations. Congress has thus effectively authorized tribal actions in federal court to vindicate tribal property rights.

The same acts of Congress and decisions of this Court discussed above also reflect an assumption that this case is justiciable. Although based on federal common law and federal statutes, the suit is a simple title action: "Plaintiffs are out of possession; the defendants are in possession, allegedly wrongfully; and the plaintiffs claim damages because of the allegedly wrongful possession." *Oneida* I, 414 U.S. at 683 (Rehnquist, J., concurring). As such, the issues here are not constitutionally committed to the political branches of government and are not barred by any policy determination of those branches.

Congress at no time ratified the illegal transaction. The record here contains no evidence that the Congress had the 1795 transaction before it when it ratified the 1798 and 1802 state treaties or that the Congress was even aware that the two later state treaties referred indirectly to the 1795 transaction. Under principles established by this Court, ratification of the 1795 transaction cannot be implied from Congress' approval of the two later treaties.

The counties and state admit that the Oneidas owned the subject property in 1795. They admit that the Oneidas lost possession of the subject property in violation of federal law. Finally, they admit that the United States could obtain on the Oneidas' behalf the same relief the Oneidas seek in this action. There is no sound reason in principle or precedent to deny that relief to the Oneidas.

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ARGUMENT

Introduction

In an effort to produce a result which cannot be supported by legal precedent, the counties raise the spectre of massive dislocation and bankruptcy of innocent property owners ensuing from this and other eastern land claims cases. County Petitioners' Br. 10-12. Such consequences have not occurred and cannot in this case.[3] Even were this controversy defined by the relief prayed for in other cases rather than that actually awarded here, the counties'

[3]Eviction was not sought by or awarded to the Oneida parties in this case. Trespass damages were sought from only municipal owners, not private parties, and then in only modest amounts. Whether private parties can be evicted or trespass damages assessed against them remains to be determined in future litigation. In such a suit, the lower courts could consider any countervailing equities of private parties and those parties could seek review in this Court with a well-developed record on those issues.

inflammatory description of these cases and their likely consequences bears little resemblance to reality.[4] Effective judicial and political restraints on these cases exist.

In the few cases where courts have considered the remedy issues,[5] they have uniformly determined that any relief awarded will be informed by equity considerations. As Judge Port observed here, the punishment in these

[4]The suggestion that economic disruption has occurred in New York State as a result of the mere pendency of this and other claims is unsubstantiated in the record. It is also untrue. Congressman Gary Lee, whose congressional district included a large part of the Oneida claim area, said in 1982:

> Mr. Chairman, fortunately in the State of New York, we have not had the economic injury that occurred, for example, out in Cape Cod in the *Mashpee* case. At this point I think we can say with a reasonable level of confidence that the transferring of homes, or properties, other exchanges of property, has taken place normally. The FHA, the VA, other banking institutions, have been able to transfer property without difficulty. The bonding of sewer districts, water districts, other public buildings, has occurred under normalcy.

Ancient Indians Land Claims Settlement Act of 1982; Hearing on S.2084 Before the Senate Select Committee on Indian Affairs, 97th Cong., 2d Sess. 24 (1982) (Statement of Representative Lee).

[5]In most of the cases, the tribal plaintiffs have not as yet proved their case on liability. The plaintiffs carry a substantial burden of proof on that score. *See* Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370, 378-80 (1st Cir. 1975); Mashpee Tribe v. New Seabury Corp., 427 F. Supp. 899, 902 (D. Mass. 1977). Some plaintiffs have already failed in their burden of proof on liability and their claims have been dismissed. *See, e.g., Mashpee*, 592 F.2d 575 (1st Cir. 1979), *cert. denied* 444 U.S. 866 (dismissed for failure to prove tribal existence); Chitimacha Tribe of Indians v. Harry L. Laws, 690 F.2d 1152 (5th Cir. 1982), *cert. denied* 104 S.Ct. 69 (dismissed for reason of confirmation of Congress). Those same defenses have been raised in other suits but are unadjudicated.

cases should be tailored to fit the crime. J.A. 166a; *see also Cayuga Indian Nation of New York v. Cuomo,* 565 F. Supp. 1297, 1310-11 (N.D.N.Y. 1983):

> Should plaintiffs ultimately prevail, equitable factors will be carefully weighed before any relief is granted. *See, Oneida v. New York, supra,* 510 F. Supp. at 1296. And, as stated previously in the discussion of justiciability, any such relief will be fashioned with the utmost restraint.

Accord, Oneida Indian Nation of New York v. State of New York, 691 F.2d 1070, 1083 (2nd Cir. 1982). No single landowner, public or private, has been evicted or bankrupted in any of these cases and the law has developed in such a way that that result is unlikely.

More importantly, Congress and the parties in a given case can forestall such a result by a legislative settlement. Four such settlements have been enacted thus far. *See* 25 U.S.C. § 1701 et seq. (Narragansett settlement); 25 U.S.C. § 1721 et seq. (Maine settlement); 25 U.S.C. § 1741 et seq. (Florida/Miccosukee settlement); 25 U.S.C. § 1751 et seq. (Connecticut/Mashantucket Pequot settlement). In addition, a settlement agreed to by the parties in the *Wampanoag Tribal Council of Gay Head, Inc. v. Town of Gay Head,* 74-5826-McN (D. Mass.) is now pending in Congress. *See* H.R. 5491, 98th Cong., 2d Sess., 130 Cong. Rec. H2946 (1984). Given the number of parties involved and the complexity of these claims, it is remarkable that in only the ten years since federal court jurisdiction over the claims has been established, nearly a half dozen of the claims have been settled by the parties.

Even were the parties in a particular case unwilling or unable to agree upon settlement terms, an ultimate

check on the claims exists. Congress asserts the power to unilaterally dispose of the cases by extinguishing or taking the Indians' claims. In 1982, for example, Congressman Gary Lee of New York introduced a bill that would extinguish tribal land claims in New York State and South Carolina. H.R. 5494, Ancient Indian Land Claims Settlement Act of 1982, 97th Cong., 2nd Sess.; introduced in the Senate by Senator D'Amato as S. 2084.[6] The bill was not enacted in part because Congress was not convinced that the normal process of negotiations among the parties should be aborted. *See, e.g.,* Remarks of Committee Chairman, House Interior and Insular Affairs, at Hearings on H.R. 5494, June 22, 1982, Tr. 3. However, these cases are clearly under Congress' watchful eye. There can be no doubt that should the parties prove intransigent or economic hardship develop, the Congress would act.[7]

In light of the restraints on these claims, the counties' protestations are fantastical. True, the claims are large. But the enormity of the claims reflects the enormity of the wrongs done to Indian tribes by the eastern states.

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[6]The Oneidas do not concede that such a bill would withstand constitutional scrutiny. Indeed, the Oneidas opposed the 1982 bill on the grounds, *inter alia,* of its unconstitutionality. But the bill and the hearings held on it show Congress' continuing interest in these cases.

[7]The Lee bill, and in all likelihood any unilateral extinguishment or taking of the claims, would not provide the tribal plaintiffs with a land base, but money damages only. For that reason, tribes have generally opposed unilateral congressional resolution of the claims, preferring instead negotiated settlements which provide for the return of some amount of land. Tribes pursue negotiated settlements in these cases with full awareness of the power claimed by Congress to extinguish or take the claims.

Despite this historic truth, neither the federal courts nor the Congress has indicated a willingness to exact or allow a comparable price in these cases from the public defendants, and most certainly not from the private defendants. "Yet we know of no principle of law that would relate the availability of judicial relief inversely to the gravity of the wrong sought to be redressed." *Oneida Indian Nation v. State of New York,* 691 F.2d at 1083.

I. The Oneidas Have A Cause Of Action For Trespass Maintainable Under The Federal Common Law

The lower courts properly recognized a federal common law right of action in the Oneidas to recover trespass damages from the counties. *See* H. Hart and H. Wechsler, *The Federal Courts and the Federal System* 773 (2nd ed. 1973) where the authors cite relations between the Indians and the United States as one of the subjects of federal common law.[8] The property right recognized by

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[8]As such, the Oneidas' property rights are consistent with this Court's jurisprudence of federal common law. As Justice Jackson has explained,

> The Federal courts have no *general* common law, as in a sense they have no general or comprehensive jurisprudence of any kind . . . But this is not to say that wherever we have occasion to decide a Federal question which cannot be answered from Federal statutes alone we may not resort to all the source materials of the common law, or that when we have fashioned an answer it does not become a part of the federal non-statutory or common law . . .

D'Oench Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447, 469 (1942) (Jackson, J. concurring). Such is the case here. Congress has codified important principles respecting tribal property rights (see, e.g., 25 U.S.C. §177) and taken steps to preserve the tribes' property rights (see, e.g., 28 U.S.C. §§1362, 2415; 25 U.S.C. §194). But Congress' endeavors in the area are piecemeal. Because the complete answer cannot be found in federal legislation, this Court has fashioned federal common law remedies to vindicate tribal property rights.

them is a unique one which in its nature and extent is defined exclusively by federal law. It is a right long recognized by this Court and one which the Oneidas unquestionably have capacity to invoke.

A. The Oneidas' property rights are founded in federal common law.

Tribal property rights originate with the founding of this country. Chief Justice Marshall, writing in *Johnson v. M'Intosh,* 21 U.S. (8 Wheat.) 543 (1823), explained those rights at length:

> They [Indians] were admitted to be the rightful occupants of the soil, *with a legal as well as a just claim to retain possession of it,* and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and *their power to dispose of the soil at their own will, to whomsoever they pleased, was denied* by the original fundamental principle [of] discovery . . .

Id. at 574 (emphasis added). The doctrine of discovery was the basic premise of all "discovering" nations' relations with Indian tribes and was often repeated in treaties. *Id.* at 586-87.

The United States acceded to the doctrine of discovery, recognizing the tribes' "unquestioned right" to exclusive possession of their lands.[9] *Cherokee Nation v. Geor-*

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[9]The doctrine of discovery also implicated the United States' relations with foreign nations. The possibility of foreign meddling on this continent via Indian tribes was a real concern of the United States in 1776, as it had been before with Great Britain. F.P. Prucha, *American Indian Policy in the Formative Years: The Trade and Intercourse Acts of 1790-1834,* 8-16 (1962). By vesting exclusive authority over relations with tribes in the United States, the doctrine of discovery served a classic federal interest in foreign affairs at the same time it outlined tribal property rights. See Cherokee Nation v. Georgia, 30 U.S. at 67-68.

gia, 30 U.S. (5 Pet.) 1, 17 (1831); *see also Oneida I,* 414 U.S. at 669; *Jones v. Meehan,* 175 U.S. 1, 8-9 (1899); *Buttz v. Northern Pacific R.R. Co.,* 119 U.S. 55, 68 (1886); *Leavenworth, Etc. R.R. Co. v. United States,* 92 U.S 733, 742 (1876); *Holden v. Joy,* 84 U.S. 211 (1872); *Clark v. Smith,* 38 U.S. (13 Pet.) 195, 201 (1839); *Lattimer v. Poteet,* 34 U.S. (14 Pet.) 4 (1840); *Fletcher v. Peck,* 6 Cranch 87 (1810).[10] Those rights were not unconditional. With their earliest recognition, tribal property rights were held inalienable to any party other than the United States. *Wilson v. Omaha Indian Tribe,* 442 U.S. at 671; *Oneida* I, 414 U.S. at 666, 678.[11] Therefore, all elements of the Oneidas' cause of action can be found in federal common law.

In many of its "almost countless" decisions on the subject *(Oneida* I, 414 U.S. n.5), this Court has given legal effect to tribal property rights in civil litigation. In *Johnson v. M'Intosh, supra,* the Court declared invalid two private purchases of Indian land made in 1773 and

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[10]The common law at the time held that a right to land included "the right to enter on it when the possession is withheld from the rightful owner; to recover the possession by suit; to retain the possession, and to receive the issues and profits arising from it." Green v. Biddle, 21 U.S. (8 Wheat.), 1, 75-76 (1823). The Oneida parties in this action have, of course, eschewed the right to recover possession and sought only damages for the counties' illegal use and occupancy. The federal common law right to recover possession clearly includes the lesser right to damages. *See, e.g.,* Bunch v. Cole, 263 U.S. 250, 254 (1923), where the Court determined that an Indian allottee was entitled to money damages for illegal use and occupancy of restricted allotment; *see also* United States v. Southern Pacific Transportation Co., 543 F.2d 676 (9th Cir. 1976).

[11]Thus, the nonintercourse provision simply "put in statutory form what was or came to be the accepted rule—that the extinguishment of Indian title required the consent of the United States." *Oneida* I, 414 U.S. at 678.

1775 without the Crown's consent. In *Marsh v. Brooks,* 49 U.S. 223, 232 (1850), the Court held, "That an action in ejectment could be maintained on an Indian right to occupancy and use, is not open to question. This is the result of the decision in *Johnson v. M'Intosh . . .*" *See also Lattimer v. Poteet, supra,* where the Court acknowledged the legal efficacy of Indian occupancy rights as of 1783; *Clark v. Smith, supra* at 201, where the Court observed that both federal and state courts had uniformly respected the Indians' right of occupancy.[12] It cannot be seriously doubted at this late date that the federal common law has long provided remedies to vindicate tribal property rights.[13]

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[12]The counties observe that many of these early cases were filed in state court and none of them involved a tribal plaintiff. County Petitioners' Br. n.21. Those observations are correct, but do not disprove the existence of a federal common law cause of action in tribes. Since tribes clearly have capacity to sue, the identity of the party plaintiffs in those cases is irrelevant. *See* I B, *infra.* In addition, the federal nature of an action is not altered simply by virtue of being filed in state rather than federal court. Brown v. Gerdes, 321 U.S. 178, 188 (1944) (Frankfurter, J., concurring). Therefore, these cases are solid authority for the proposition that Indian property rights have been cognizable under federal law since the early days of the Republic.

[13]The counties argue that a federal common law right of action such as that sued upon by the Oneidas has never been recognized by this Court. As the above discussion demonstrates, that argument is false. Even had the right of action never been recognized before, the two reasons given by the counties as to why one should not be created now are unpersuasive. First, the counties claim that the Indian Claims Commission could have vindicated the Oneidas' rights here. County Petitioners' Br. 26. But the Indian Claims Commission had jurisdiction over money claims against the United States only, not over title claims. *See* Otoe and Missouria Tribe of Indians v. United States, 131 F. Supp. 265 (Ct. Cl. 1955); *see also* dis-

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B. Indian tribes have capacity to vindicate their property rights directly.

The counties and state maintain that the Oneidas lack capacity to sue on federal common law rights respecting tribal property that may have existed in 1795. County Petitioners Br., 25; State Petitioner's Br. 12-13. That proposition has been put to rest by this Court and Congress.

In *Lane v. Santa Rosa,* 249 U.S. 110 (1919), a pueblo sought to enjoin the Secretary of the Interior from disposing of pueblo lands under public land laws. Relying on *Cherokee Nation v. Georgia, supra,* the Secretary challenged the pueblo's capacity to sue. The Court rejected the Secretary's reading of *Cherokee Nation v. Georgia* and upheld the tribe's capacity to sue. *Lane v. Santa Rosa, at* 113. Similarly, in *Creek Nation v. United States,* 318 U.S. 629, 640 (1943), the Court observed that tribes have their own "independent remedy for wrongs done them . . . as a general legal right . . ." And again, in *Poafpybitty v. Skelly Oil Co.,* 390 U.S. 365, 370 (1968), the Court held, referring to *Creek Nation, infra,* ". . . that the right of the United States to institute a suit to pro-

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cussion *infra,* p. 47. Second, the counties point to "a matter of high policy" implicated in re-establishing Oneida sovereignty of the claim area. County Petitioners' Br. 27. Whatever that phrase may mean, the argument proves too much. It is undisputed that the United States could pursue the same common law remedy sought by the Oneidas without running afoul of such a bar. Assuming *arguendo* the right does not already exist, there is no reason not to create federal common law remedies on behalf of the Oneidas.

tect the allotment did not diminish the Indian's right to sue on his own behalf."[14]

Were there any doubt on the matter after those decisions, Congress removed it in 1966 with the enactment of P.L. 89-635. Act of Oct. 10, 1966, 84 Stat. 880 (codified at 28 U.S.C. § 1362). That statute extends federal district court judisdiction over

> . . . all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

Id.[15] This Court has already determined in *Oneida* I that this suit, filed by the Oneida tribes after the enactment of § 1362, raises federal questions. By express act of Congress, then, the Oneidas have capacity to pursue their federal common law property rights.[16]

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[14]Overlooking these precedents, the counties and state cite Jaeger v. United States, 27 Ct. Cl. 278 (1892), as authority for their argument that tribes can sue only when specially authorized by Congress. County Petitioners' Br. 21; State Petitioner's Br. 11-12. However, *Jaeger* refers only to suits by tribes against the United States in the Court of Claims. *See Jaeger* at 285. The special jurisdictional history of tribal claims against the United States is well known to this Court. *See, e.g.,* United States v. Sioux Nation, 448 U.S. 371, 384 (1980). This suit is not against the United States and is not governed by those rules. *See* discussion of 28 U.S.C. §1362, *infra* page 40.

[15]Two of the three Oneida parties in this litigation—the Oneida Indian Nation of New York and the Oneida Indian Nation of Wisconsin—are recognized by the Secretary of the Interior. *See* 48 Fed. Reg. 56862, Dec. 23, 1983.

[16]Many of the claims litigated by tribes under §1362 arose well before passage of the act. For example, the Puyallup Tribe sued third parties under §1362 on a title claim based on

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C. The 1973 Act left the Oneidas' federal common law remedies intact.

As is clear from the discussion above, the federal common law affords tribes substantial remedies to protect tribal property rights. The counties and state respond that those federal common law remedies were pre-empted by statutory penalties enacted as part of the 1793 Act. Relying primarily on the presence of a specific misdemeanor added to the nonintercourse provision in 1793, they construe the Act as so comprehensive as to preclude all other non-statutory remedies. County Petitioners' Br. 27-30; State Petitioner's Br. 13-19. The argument falls under the weight of the statute's language to the contrary and decisions of this Court construing other statutory restraints on alienation of Indian land.

The pre-emptive effect of a federal statute on federal common law is an issue of statutory construction. The specific inquiry is whether the federal legislation speaks "directly to a question" that would otherwise be answered by reference to the federal common law. *Milwaukee v. Illinois*, 451 U.S. 304, 315 (1981). Since the counties' and state's arguments depend upon the 1793 additions to the 1790 Indian Trade and Intercourse Act, the review of statutory language must begin with the 1790 act.

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1854 and 1855 treaties and an 1857 Executive Order. Puyallup Tribe v. Port of Tacoma, 525 F. Supp. 65 (W.D. Wash. 1981), *aff'd* 717 F.2d 1251 (9th Cir. 1984), *cert. denied* 104 S.Ct. 7324 (1984). Similarly, the Omaha Tribe invoked §1362 for title claims based on river movements between 1867 and 1927. Wilson v. Omaha Indian Tribe, 442 U.S. at 659.

The capacity of the tribal plaintiff was not questioned in any of these proceedings. Section 1362 cannot be construed, then, as opening the federal courthouse doors only to claims accruing before its passage.

In its seven sections, the 1790 act dealt with a number of discrete and long-standing concerns in the administration of Indian affairs. 1 Stat. 137, Act of July 22, 1790; *see generally,* F.P. Prucha at 44. Sections one, two and three regulated trading with Indian tribes. Section four dealt with the purchase of tribal lands and declared that no such purchase shall be valid unless done under authority of the United States. Section five addressed the problem of settlements on and commission of crimes in Indian territory by non-Indians. In its only provision of general applicability, section six of the act authorized the prosecution of offenders for violation of any part of the act: "[T]hat for any of the crimes or offenses aforesaid, the like proceeding shall be had . . . as . . . are directed for any crimes or offenses against the United States."[17]

The 1793 Act carried forward the substantive provisions of the 1790 act. 1 Stat. 329. Its fifteen sections included new substantive provisions and added more enforcement mechanisms to some of the carryover provisions. The nonintercourse provision, section eight of the 1793 Act, remained primarily a declaratory section, but with two changes. First, it contained the additional language that unauthorized transactions shall have no validity "in law or equity." Second, it specified a penalty of a fine not exceeding one thousand dollars and imprisonment up to twelve months for the violation of the section, previously punishable in the 1790 act without reference

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[17]Thus, the counties' assertion that the 1790 act contained no remedy for violation of the nonintercourse provision is incorrect. *See* County Petitioners' Br. 28-29.

to a specific fine or imprisonment term.[18] Three new sections of the 1793 Act specified further details regarding the prosecution of the "crimes, offenses or misdemeanors" described in the act. *Id.*, sections 10, 11, 12. Those new sections did not criminalize any acts not made punishable in the preceding substantive provisions or authorize additional penalties for violations of those sections. Thus, the only remedy available for violation of the 1793 nonintercourse provision was the fine and term of imprisonment specified in section eight, a penalty which differed from that in the 1790 act only in its express limitations.

Two conclusions can be drawn from this review of the statutory language. First, the 1793 Act had no greater pre-emptive effect than the 1790 act. The only significant addition made in 1793 to the nonintercourse provision is the reference to "law and equity." Use of those terms clearly indicates that Congress anticipated legal proceedings respecting attempted transfers of Indian lands. The specific penalty added in 1793 cannot be considered significant. Under section six of the 1790 act, exactly the same penalty could have been imposed for violation of the nonintercourse provision. Since the 1790 act did not pre-empt federal common law remedies, neither can the 1793 Act be construed as pre-emptive. *See* County Petitioners' Br. 17-18.

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[18]The misdemeanor penalty was imposed on any person negotiating with tribes for the purchase of land, regardless of whether the negotiation resulted in an actual purchase. It punished those who purported to exercise authority committed exclusively by the Constitution to the United States, *i.e.* treaty making with Indian tribes. *See* U.S. Const., art. I, sec. 8, cl. 3; art. II, sec. 2, cl. 2. The declaratory language of the provision applied only to consummated transactions.

Second, the 1793 Act did not speak directly to the issue of tribal remedies for violation of the nonintercourse provision. No provision at all was made for civil suits by tribes, for tribal enforcement of the single criminal penalty specified for illegal land transactions, or for tribal participation in any fines collected under the nonintercourse act.[19] Furthermore, the act made no mention of civil suits by any party plaintiff to set aside transactions that violated the nonintercourse provision. The counties concede that the 1793 Act did not pre-empt common law remedies previously available to the United States, even though the act made criminal penalties available to the United States. County Petitioner's Br. 32-34. It would seem *a fortiori* that the Act did not pre-empt tribal suits since Congress did not speak to that question at all. *See Milwaukee, supra* at 315.[20]

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[19]The 1793 Act did not explicitly create an informant's suit. It simply specified that any fines or forfeitures would be divided between any informant and the United States. 1 Stat. at 330. In some substantive provisions, the 1790 act did the same. *See, e.g.*, 1 Stat. 137, §3. It would appear, then, that both statutes implicitly authorized informants suits to enforce the criminal penalties. *See* County Petitioners' Br. 29.

[20]The counties attempt to avoid this conclusion by suggesting that the penalties specified in other substantive provisions of the Act, primarily the President's authority to remove illegal settlers, could be invoked to remedy a violation of the nonintercourse provision. County Petitioners' Br. 29. There is nothing in the statutory language or legislative history to support this suggestion. In fact, the historical evidence is to the contrary. After 1793, the President frequently exercised his authority to remove illegal settlers who had no claim of title to Indian lands. F.P. Prucha at 147-185. But there is no evidence that the President ever invoked that authority to remove settlers who asserted paper title to the land obtained in violation of the nonintercourse provisions. Certainly, the mere existence of en-

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Even though the 1793 Act contained no provision for tribal suits, the counties and state argue that the statute was intended to be comprehensive and, as such, displaces all other remedies. They point to the Federal Water Pollution Control Act Amendments of 1972 (FWPCA), construed in *Milwaukee, supra,* as pre-emptive, as an example of such a statute. County Petitioners' Br. 28-29; State Petitioner's Br. 13.[21] A comparison of the two statutes demonstrates the error of their construction of the 1793 Act.

As printed in the *Statutes at Large,* the FWPCA covers approximately seventy-four pages and deals with all aspects of the subject. Pub. L. No. 91-500, 86 Stat. 816 (codified at 33 U.S.C. §1361 et seq.) (1972). It contains two separate enforcement sections, one governing suits by the federal government and another authorizing citizen suits. Section 309 describing remedies available to the federal government identifies the substantive sections which the government can sue to enforce, prescribes in

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forcement mechanisms attached to other substantive provisions will not support a finding of pre-emption. *See* Wilson v. Omaha Tribe, 442 U.S. at 666, where the Court noted the penalties referred to by the counties and upheld a tribal suit for quiet title.

[21]The state also invokes a presumption favoring pre-emption of federal common law remedies where the statute is comprehensive. *See* State Petitioner's Br. 17-19. As we demonstrated in this section of the brief, the 1793 Act is not comprehensive. Even if it were, no such presumption is available here. The canons of construction applicable to Indian statutes preclude operation of that presumption where it would diminish or restrict tribal rights. *See* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-44 (1980).

detail the notice that must be given a violator and the affected State before suit can be filed, specifies the relief that can be sought in such suits, sets ranges of monetary penalties that can be imposed for various violations, and authorizes imprisonment of violators under certain circumstances. *Id.* at 859-60. In comparable detail, section 505 of the act authorizes citizen suits. It identifies the substantive provisions of the act that can be enforced by citizen suits, requires that notice be given the administrative agency and the alleged violator before suit is filed, sets out the available remedies in such an action, makes special jurisdictional provisions for those suits, and even addresses the allocation of litigation costs. *Id.* at 888-89. Not surprisingly, the Court in *Milwaukee* construed the FWPCA as pre-empting the common law remedy that would have otherwise been available to the plaintiff.[22] The FWPCA has also been construed to pre-empt all remedies other than those expressly set out for the United States. *In the Matter of Oswego Barge Corp.,* 664 F.2d 327 (2nd Cir. 1981).

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[22]It is also significant that the subject matter of the FWPCA was a technical one ill-suited to development through federal common law. For that reason, Congress vested authority to administer the act in an agency possessing the required expertise. *Milwaukee,* 451 U.S. at 325. The particular common law remedy sought by the plaintiff in *Milwaukee* was directly contrary to regulations adopted by the agency under the act, *i.e.* plaintiff sought higher effluent limitations and overflow discharge controls of two waste treatment plants than those set by regulations. *Id.* at 319-20. Thus, the proposed common law remedy in *Milwaukee* was not interstitial, but would have completely supplanted the regulatory scheme. That fact made a pre-emption finding particularly appropriate. By contrast, the federal common law remedy sought by the Oneidas here is neither technical in nature nor inconsistent with the single express remedy found in the provision.

In contrast, the 1793 Act is plainly not so comprehensive as to pre-empt all remedies not addressed in the act. The 1793 Act covers three pages as printed in the *Statutes at Large* and contains one substantive provision regulating land transactions with Indian tribes.[23] Further, as noted above, the 1793 Act contains no provision dealing with tribal suits. In other words, the Act is not so sweeping or detailed to support a broad pre-emptive reading. It is well established in such cases that federal courts are free to fill in the statutory gaps with federal common law. *E.g., Mobil Oil Corp. v. Higgenbothom,* 436 U.S. 618, 625 (1978).[24]

In a prior decision, this Court explicitly rejected a pre-emptive construction of another federal statutory restraint on alienation of Indian land. *Poafpybitty v. Skelly Oil Co., supra.* There an Indian allotee sought damages

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[23]The debate respecting the forfeiture clause does not show that Congress placed in the statute all remedies it intended to preserve. *See* County Petitioners Br. 19-20. That debate involved the repeal of an existing statutory remedy, not the availability of any federal common law remedy. Thus, the debate shows only that a particular statutory remedy was controversial, nothing more.

[24]The counties cite two other decisions on this point, neither of which advances their argument. Those cases, Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981), and Northwest Airlines, Inc. v. Transport Workers, 451 U.S. 77 (1981), did not involve statutory displacement of pre-existing federal common law remedies. Rather, the plaintiffs there sought the *creation* of a federal common law right of contribution in a *statutory proceeding*. The Court was reluctant to create such a right for the first time when Congress had legislated on the subject in a comprehensive manner. *Texas Industries, Inc.* at 640-42; *Northwest Airlines, Inc.*, at 95-98. The 1793 Act must be construed with reference to independent, previously existing federal common law remedies.

for breach of lease of his restricted allotment.[25] The lease had been made under authority of a federal statute which contained two provisions relevant here. First, the statute subjected such leases to extensive secretarial supervision. Second, the statute expressly reserved all legal and equitable remedies for the Indian allottee after the expiration of the trust period. 390 U.S. at 372-75. Because of these provisions in the statute, the non-Indian lessee argued that all direct actions of the allottee, except those expressly preserved at the expiration of the trust, were lost by negative inference. The Court rejected this claim. It found that the allottee had capacity to sue and "no warrant for implying by negative inference ". . . [that] all remedies otherwise available to the Indian allottee . . ." must be denied to him. *Id.* at 375. The message of *Poafpybitty* is clear: be it by negative inference or pre-emption, express remedies provided for violation of a restraint on alienation do not preclude an Indian owner from maintaining a federal common law action to protect his property. *See also Ewert v. Bluejacket,* 259 U.S. 129 (1922), where the Court allowed an Indian allottee to sue to set aside a void conveyance even though the applicable statute authorized only a $5,000 fine for the violation.

In summary, there is no basis in the statutory language or decisions of this Court for the proposed con-

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[25]Although the Court in *Poafpybitty* did not deal with the issue at length, it is clear from the opinion that the cause of action sued upon by the Indian allottee arose under federal common law. 390 U.S. at 367 n. 2, 376. Thus, the statutory construction sought by the non-Indian lessee there is the same as that sought by the counties and state here, although couched in different language.

struction of the 1793 Act as abolishing the Oneidas' federal common law remedies. The strained quality of the argument is particularly evident in light of the avowed protective purpose of the act (see discussion *infra,* p. 25) the substantial and varied nature of federal common law remedies as compared to the statute (see discussion *supra,* p. 12), and the strong evidence that Congress believed at the time that direct tribal actions could be maintained (see discussion *infra,* p. 30). For all these reasons, the proposed construction is without foundation.

II. The Oneidas Have A Current Right Of Action Under The 1793 Act

The district court below premised the liability of the counties to the Oneidas largely on the 1793 Act. 434 F. Supp. at 537-40. The court of appeals, observing that the counties had not denied that the Act was violated in 1795, concluded that the Act provided the Oneidas an implied action to set aside the violative transaction. 719 F.2d at 532. That statutory action, it further held, did not abate with the expiration of the 1793 Act. *Id.* at 537. Both holdings are well grounded in the language of the Act and its legislative history and are wholly consistent with decisions of this Court.

A. The declaratory language of the 1793 nonintercourse provision gives rise to tribal actions to enforce the Act.

In determining whether the Oneidas have a right of action for trespass damages under the 1793 Act, the intent of Congress governs. *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. at 639. That intent may be ascertained from a number of factors, including

> legislative history and purposes of the statute, the identity of the class for whose particular benefit the statute was passed, the existence of express statutory remedies adequate to serve the legislative purpose, and the traditional role of the states in affording the relief claimed.

Daily Income Fund, Inc. v. Fox, — U.S. —, 78 L.Ed. 2d 645, 655 (1984).[26] Applying these factors here, it is plain that Congress intended to specially benefit Indian tribes and that tribal beneficiaries can enforce the statutory restraint on alienation through private actions.

It cannot be seriously doubted that the 1793 Act bestowed a special protection on tribal lands. This Court has so observed on a number of occasions. *See Wilson v. Omaha Tribe,* 442 U.S. at 664 ("... a major purpose of these acts as they developed was to protect the rights of Indians to their property"); *Federal Power Commission v. Tuscarora Indian Nation,* 362 U.S. 99, 119 (1960) ("The obvious purpose of that statute is to prevent unfair, improvident or improper disposition by Indians of land owned or possessed by them to other parties ..."); ***United***

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[26]This standard is used to ascertain whether Congress intended to create a *private* right of action to enforce a statute. The Oneidas are not private parties in any sense. The Court has time and again acknowledged that, "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory ... [they] are a good deal more than 'private, voluntary associations.'" United States v. Mazurie, 419 U.S. 544, 557 (1975); United States v. Wheeler, 435 U.S. 303, 323 (1978). Federal legislation dealing with Indian tribes, therefore, cannot be viewed as affecting individual conduct or property, but as "governance of once-sovereign communities." United States v. Antelope, 430 U.S. 641, 646 (1977). The following discussion assumes *arguendo* applicability of the general standard here.

States v. Candelaria, 271 U.S. 432, 441-42 (1926) (Congress intended "to prevent the Government's Indian wards from improvidently disposing of their lands and becoming homeless public charges . . .").[27]

But "the question is not simply who would benefit from the act, but whether Congress intended to confer federal rights on those beneficiaries." *California v. Sierra Club*, 451 U.S. 287, 294 (1981). The language of the nonintercourse provision speaks for itself here, too. By its terms, Indian tribes are entitled to oversight by the United States of tribal land transactions. Indeed, failure of the United States to perform its duty as overseer of such transactions is actionable breach of trust under the Act. *See United States v. Oneida Indian Nation of New York*, 477 F.2d 939, 942 (Ct. Cl. 1973). Thus, the focus on a specially protected class that received federal rights by virtue of the nonintercourse provision is unmistakeable.[28]

More importantly, there is ample evidence in the statutory langauge, legislative history and contemporary

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[27]This view of the Act is taken as settled by the lower courts. *See, e.g.*, United States v. Southern Pacific Transportation Co., 543 F.2d at 697; Mohegan Tribe v. Connecticut, 638 F.2d 612, 622 (2nd Cir. 1981); Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370, 377 (1st Cir. 1975); Alonzo v. United States, 249 F.2d 189, 196 (10th Cir. 1957); Schaghticoke Tribe of Indians v. Kent School Corp., Inc., 423 F. Supp. 780, 784 (D. Conn. 1976); Narragansett Tribe v. Southern R.I. Land Devel. Corp., 418 F. Supp. 798, 803 (D.R.I. 1976).

[28]There is no inconsistency in finding that a statute benefited a special class and also served a broader public purpose. For example, the Commodities Exchange Act, construed in Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353 (1982), benefited the economy as a whole but was enacted for the special benefit of investors in futures contracts who could sue to enforce its provisions in private damages actions. *Id.* at 390.

legal context that Congress intended that tribes enforce the statutory prohibition in private actions. The nonintercourse provision states that "no purchase or grant of lands or of any title or claim thereto, from any Indians or nation or tribe of Indians . . . shall be of any validity in law or equity . . . " unless entered into in accordance with the section's provisions. 1 Stat. at 330. That language and similar language in other restraints on alienation of Indian lands have been consistently read as voiding illegal transactions. *See Bunch v. Cole*, 263 U.S. at 254; *Ewert v. Bluejacket*, 259 U.S. at 138; *United States v. Noble*, 237 U.S. 74, 83 (1915); *United States v. Southern Pacific Transportation Co., supra; United States v. Boylan*, 265 Fed. 165 (2nd Cir. 1920). In *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979), section 215 of the Investment Advisors Act, which voided certain transactions was held to support an implied private right of action.[29] The Court reasoned that by "declaring certain contracts void, section 215 necessarily contemplates that the issue of voidness under its criteria may be litigated

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[29]The voided transaction in *Transamerica* was a contract, not a land transfer. Thus, *Transamerica* gives little guidance as to the appropriate remedy for a void land transfer. But the existence of a right of action is a different question from the propriety of specific relief. As the Court stated in Bell v. Hood, 327 U.S. 678, 684 (1946),

> where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.

See also Davis v. Passman, 442 U.S. 228, 239 (1979). The counties challenge only the existence of a cause of action in the Oneidas, not the propriety of relief awarded. *See* Petition for Certiorari, No. 1065. On that score, *Transamerica* supports the Oneidas' right of action.

somewhere." *Id.* at 19.[30] Similarly, Congress contemplated that voidness under the nonintercourse provision would be litigated by the tribes. *See also* discussion of 25 U.S.C. § 194, *infra* p. 30.

The legislative history of the 1793 Act likewise supports a private right of action. Although the legislative history of the act is "sparse and incomplete", 719 F.2d at 533, one important item of legislative history is revealing. Shortly after the passage of the 1790 nonintercourse provision, President Washington met with Cornplanter, Chief of the Seneca Tribe, to hear the tribe's complaint regarding certain land transactions. Referring to the 1790 act, President Washington assured the tribe that violations of the nonintercourse provision could be sued upon directly by it in federal court.

> Here, then is the security for the remainder of your lands. No State, nor person, can purchase your lands, unless at some public treaty, held under authority of the United States . . . if . . . you have any just cause of complaint against [a purchaser] and can make satisfactory proof thereof, *the federal courts will be open to you for redress, as to all other persons.*

I *American State Papers, Indian Affairs* 139 (1834) (emphasis added). This speech was printed and com-

[30]The presence in the nonintercourse provision of a misdemeanor penalty does not distinguish it from section 215 of the Investment Advisors Act construed in *Transamerica*. Only where the statute in question did not benefit a special class or contained comprehensive remedies has the presence of a statutory remedy been sufficient to refute an implied right of action. *See* Middlesex Cty. Sewerage Auth. v. Sea Clammers, 453 U.S. 1, 13-14 (1981). That is not the case with either the nonintercourse provision or section 215 of the Investment Advisors Act.

municated to Congress on January 11, 1972. *Id.* at 142-43.[31] The following year Congress re-enacted substantially the same nonintercourse provision, the only significant change being the added reference to "law and equity". *See* discussion *supra,* p. 17. By doing so, Congress effectively adopted the President's construction. *See Johnson v. Southern P. Co.,* 196 U.S. 1, 19 (1904).

A final circumstance that may indicate Congress' intent respecting private rights of action is the legal context within which Congress enacted the statute. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran,* 456 U.S. at 378. The concerns which prompted the current exacting standards for finding an implied action were entirely absent in 1793. *Id.* at 374-78; *California v. Sierra Club,* 451 U.S. at 298-301 (Stevens, J., concurring). Congress acted instead in 1793 under the common law rule explained in *Texas & Pacific Ry. Co. v. Rigsby,* 241 U.S. 36 (1916): where a statute is enacted for the benefit of a class of

[31]Since President Washington was a major actor in the formulation of both the 1790 and 1793 acts, his view of the meaning of the nonintercourse provision cannot be taken lightly. *See* Prucha, 44, 46-49. That President Washington may have been proven wrong forty years later on the technical jurisdictional point does not undermine the reliability of his analysis as of 1790. *Cf.* Cherokee Nation v. Georgia, 30 U.S. at 18; County Petitioners' Br., n. 18. His speech is the best contemporaneous evidence on both the existence of a cause of action and the jurisdictional point.

Further, Congress would not have assumed even after the Court's decision in *Cherokee Nation* that tribes lacked capacity to sue and on that basis denied tribes an implied right of action. In *Cherokee Nation,* the Court held only that tribes were not foreign nations within the Court's original jurisdiction, not that tribes lacked the general capacity to sue. Lane v. Santa Rosa, *supra.* In fact, state courts entertained suits by tribal plaintiffs before the federal courts acquired federal question jurisdiction. Clinton & Hotopp, "Judicial Enforcement of the Federal Restraints on Alienation: The Origins of the Eastern Land Claims," 34 Me.L.Rev. 17, 46 n. 141 (1979).

which plaintiff is a member, the violation of the statutory right gives rise to a remedy, which the courts will provide unless the statute indicates to the contrary. *See also Ward v. Love County,* 253 U.S. 17, 24 (1920). Thus, the legal context of the 1793 statute corroborates the evidence of an intent to provide private rights of action found in the legislative history and statutory language.

Two other factors not directly related to Congress' intent are often looked to in determining implied statutory claims: whether it is consistent with the underlying purpose of the statute and whether the issue is one traditionally relegated to state law. *Cort v. Ash,* 422 U.S. 66, 78 (1975); *Texas Industries, Inc.,* 451 U.S. at 639. The answers to both inquiries are self-evident here. Because the statute provides no express remedies to set aside the land transactions declared of no effect by the nonintercourse provision, tribal suits are essential to effectuate the protective purpose of the Act. Otherwise, tribes have no sure means of recovering possession of lands lost in violation of the Act. And this Court held in *Oneida* I that protection of tribal property rights has traditionally been the exclusive province of federal law. 414 U.S. at 666. Thus, every relevant factor demonstrates the propriety of a private right of action in the Oneidas to vindicate their property rights. *See also, Wilson v. Omaha Tribe,* 442 U.S. at 670-71.

This Court need not be concerned that it would overstep proper judicial bounds by explicitly recognizing a statutory cause of action in the Oneidas. Since the enactment of the 1793 Indian Trade and Intercourse Act, Congress has repeatedly acted in recognition of or to preserve such tribal suits. In 1822, Congress enacted a statute allocating the burden of proof in such cases:

> That, in all trials about the right of property, in which Indians shall be party on one side and white persons on the other, the burden of proof shall rest upon the white person, in every case in which the Indian shall make out a presumption of title in himself from the fact of previous possession and ownership.

Act of May 6, 1822, ch. 68, 3 Stat. 682, § 4; Act of June 30, 1834, ch. 161, 4 Stat. 733, § 22; Rev. Stat. 2126; now 25 U.S.C. § 194. Because very nearly all Indian lands were tribally owned in 1822, the reference to Indians as a party has been construed to include Indian tribes. *Wilson,* 442 U.S. at 665. And Indian tribes have historically been regarded as immune from suit as governments. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58-59 (1978). In enacting the burden of proof statute, then, Congress directly acknowledged that tribes had both capacity and a cause of action to vindicate tribal property rights.

In 1966, Congress provided that federal district court jurisdiction shall extend to all such actions, regardless of the amount in controversy. *See* 28 U.S.C. § 1362. That act places tribal plaintiffs in substantially the same position as the United States with respect to those claims. *Moe v. Salish and Kootenai Tribes,* 425 U.S. 463, 472-73 (1976). In addition, Congress has on four occasions extended the statute of limitations that governs suits by tribes and the United States to recover trespass damages, specifically exempting title suits. *See* discussion *infra,* pp. 39-43.

Congress has also acted to preserve the claim that is the subject of this suit. In 1950, Congress extended New York state jurisdiction over Indian reservations, but explicitly provided that state law or jurisdiction would not

apply to tribal land claims. Act of July 2, 1948, ch. 809, 62 Stat. 1224, codified at 25 U.S.C. § 233. The legislative history of that act explains the purpose of the proviso as preserving Indian land rights as they existed before the passage of that act:

> [t]hey [Indian tribes] may go into the Federal courts and adjudicate any differences they may have had between themselves and the great State of New York relative to their lands, or claims in regard thereto, . . .

96 Cong. Rec. 12460 (1950) (remarks of Congressman Morris). The right of action recognized and preserved by Congress in 1950 is the right of action sued upon by the Oneidas in 1970. Judicial cognizance of that right is, therefore, in the established tradition of statutory construction where the statute creates a right but does not specify a remedy. *Bell v. Hood, supra.*

B. The Oneidas' statutory right of action has not abated.

The counties maintain that, even if the Oneidas had a statutory action in 1795, the action abated when the statute expired in 1796. According to them, a cause of action cannot survive the repeal or expiration of the statute that gives rise to it unless the action has proceeded to final judgment. County Petitioners' Br. 35-38. The counties overlook the significant exception to that abatement rule for re-enacted statutes.[32]

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[32]In their abatement discussion, the counties distinguish between abatement of the Oneidas' federal common law and statutory rights of action. However, both their arguments rely in the end on the 1793 Act. For that reason, only the Act is addressed here.

The 1793 nonintercourse provision did not simply expire.[33] It was re-enacted in every subsequent revision of the Indian Trade and Intercourse Act with only minor word changes. *See* Act of May 19, 1796, ch. 30, 1 Stat. 469, § 12; Act of March 3, 1799, ch. 46, 1 Stat. 743, § 12; Act of March 30, 1802, ch. 13, 2 Stat. 139, § 12; Act of June 30, 1834, 4 Stat. at 730; Rev. Stat. § 2116; now 25 U.S.C. § 177. Thus, the nonintercourse provision has been continuous federal law since 1790. *Oneida* I at 667-68.

The abatement rule is inapplicable in such circumstances.[34] That is, where identical or substantially similar statutory provisions have been continually in force, the subsequent legislation is construed as a continuation of the earlier legislation despite formal repeal or expiration

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[33]Neither is the nonintercourse provision penal in nature and therefore subject to abatement as the counties suggest. See County Petitioners' Br. 36. As explained in Trop v. Dulles, 356 U.S. 86, 95-96 (1958):

> In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purpose of punishment—that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose.

The nonintercourse provision is manifestly intended to accomplish "some other legitimate governmental purpose" other than to punish and is not therefore, penal. In any event, only prosecutions under the misdemeanors could abate since those provisions did differ from one act to another. But the declaratory language of the provision, sued upon by the Oneidas, did not vary substantially.

[34]The counties argue that the rule relating to nonabatement of statutory policies continually in force is a modern rule not applicable to the 1793 statute. County Petitioners Br. n.29. True, Congress modified the common law of abatement in 1871. However, as the *Joliffe* case demonstrates, the abatement rule for re-enacted statutes was recognized in the pre-1871 common law.

of the earlier statute. *Bear Lake Irrigation Co. v. Garland,* 164 U.S. 1, 11-12 (1896); *Pacific Mail S.S. Co. v. Joliffe,* 69 U.S. (2. Wall.) 450, 456 (1865); *see also* C. Sands, I A *Statutes and Statutory Construction,* sec. 22.33 (4th ed. 1972). That doctrine governs here.

For this reason, the nonintercourse provision is distinguishable from the statutes construed in those cases relied on by the counties. *See Hamm v. City of Rock Hill,* 379 U.S. 306 (1964) (state criminal trespass act preempted by Civil Rights Act); *Gulf, Colorado & Santa Fe Railway Co. v. Dennis,* 224 U.S. 503 (1912) (statute declared unconstitutional and no similar statute enacted); *United States v. Tynen,* 78 U.S. 88 (1871) (criminal statute repealed by clear repugnancy with later statute); *Norris v. Crocker,* 54 U.S. 429 (1851) (provision repealed by enactment of inconsistent statute).[35] None of these cases suggests that a statutory action abates where, as here, the expired statute has been continuously re-enacted. Simply stated, the Oneidas' statutory cause of action was enforceable in 1795 and is enforceable now.

III. The United States Has Not Ratified The 1795 Transaction By Implication Or Otherwise

Although the counties and state acknowledge the absence of contemporaneous federal approval or explicit federal ratification of the 1795 transaction, they assert sub-

[35]The *Norris* case is not an exception, as the counties suggest. Although Congress enacted a new fugitive slave act while an action under a former statute was pending, the later statute repealed the earlier statute by virtue of the inconsistency between the two. *Id.* at 472. Thus, the continuity in purpose and statutory language present in the nonintercourse provisions was missing in the statute construed in *Norris.*

sequent ratification by implication as a by-product of the federal approval of the 1798 and 1802 Oneida-New York State transactions.[36] County Petitioners' Br. 39-44; State Petitioner's Br. 32-36. The argument fails for two reasons. First, federal ratification of Indian land purchases must be plain and unambiguous, such as that were the 1798 and 1802 state treaties. Second, even were implicit federal approval sufficient, there is no evidence to support a finding of implicit ratification here.

A. Congress must express its intent plainly and unambiguously to extinguish Indian property rights.

It has long been a rule of this Court that ambiguities in Indian treaties, agreements, and statutes will be resolved in favor of the Indians' interests as between the tribe and the United States. *Ramah Navajo School Board v. Bureau of Revenue,* 458 U.S. 832, 846 (1982); *White Mountain Apache, supra* at 144. A corollary of that rule is that, although Congress may extinguish Indian property rights, it must express its intent plainly and unambiguously. As stated in *United States v. Santa Fe Pacific R.R. Co.,* 314 U.S. 339, 353-54 (1941):

> . . . an extinguishment [of Indian title] cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards. As stated in *Choate v. Trapp,* 224 U.S. 665, 675, . . . the rule of construction recognized without exception for over a century has been that 'doubtful expressions instead of being resolved in favor of the

[36]Inasmuch as the ratification argument assumes title in the Oneidas until the act of ratification, the counties must carry the burden of persuasion on this point. See 25 U.S.C. §194.

> United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith.'

The courts below correctly applied the *Santa Fe* rule here to judge the sufficiency of the claimed ratification of the 1795 transaction.

To avoid the plain and unambiguous standard, the counties and state cite cases where, it is suggested, an intent to alter tribal property rights was implied from less than plain congressional action.[37] The first, *Federal Power Commission v. Tuscarora Indian Nation, supra,* did not address the nature of congressional action required to extinguish Indian title. The second, *United States v. National Gypsum Co.,* 141 F.2d 859 (2nd Cir. 1944), involved an express delegation of trustee powers by the Congress to the state.[38]

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[37]The counties also rely on the proposition that the United States can subsequently ratify third party trespasses on Indian land by implication. See County Petitioners Br. 39. The two cases cited for that proposition are taken wholly out of context. Both cases refer to the familiar doctrine of principal-agency law that the principal can impliedly ratify a previously unauthorized act of his agent, thereby adopting the act as his own by relation back. See Shoshone Tribe v. United States, 299 U.S. 476, 496 (1937); United States v. Northern Paiute Nation, 490 F. 2d 954, 957-58 (Ct. Cl. 1974). Thus, the action being ratified in those cases was not the third parties' trespass, but the originally unauthorized acts of federal officers in approving or assisting in the trespass. Even so, where ratification of a federal agent's prior act extinguishes an Indian property right, the intent to ratify must be plain from the circumstances or congressional language. Coast Indian Community v. United States, 550 F.2d 639, 649 (Ct. Cl. 1977).

[38]The court examined the "understanding" of involved federal and state officials as evidence of the proper construction of the prior, express delegation of authority to the state. *National Gypsum* at 863. However, the court did not find approval of the state's authority to lease tribal lands from those official's past practices.

One lower court does indicate that a standard less rigorous than that applied in *Santa Fe* is applicable under certain circumstances. *Seneca Nation v. United States,* 173 Ct. Cl. 912 (1965). Without reference to this Court's decision in *Santa Fe,* the Court of Claims found extinguishment of the tribe's title from Congress' "explicit recognition and implicit ratification of New York's ownership of the tract . . ." *Id.* at 915. However, the court expressly conditioned applicability of that standard on the absence of any contention that the takings were inequitable in any respect. *Id.* at 915-16. Unlike the Seneca Nation, the Oneidas in their complaint alleged that the state had fraudulently induced them to enter into the 1795 transaction and had paid unconscionable consideration. J.A. 9a. Under the circumstances, there is no justification for applying any standard other than the rigorous plain and unambiguous test of *Santa Fe* to judge the counties' and state's evidence of implied ratification.

B. The acts of Congress approving the 1798 and 1802 state treaties did not validate the 1795 transaction.

Whether judged by the standard in *Santa Fe* or *Seneca Nation*, the acts of Congress which approved the 1798 and 1802 treaties are plainly insufficient to ratify the 1795 transaction. A brief review of Congress' actions with respect to the two later treaties shows the complete absence of intent to ratify the 1795 transaction.

The 1798 New York State treaty with the Oneidas recited the presence of a United States Commissioner. In the metes and bounds description of the land purchased, the State referred to a survey line run as part of the "last purchase" from the Oneidas. J.A. 36a. On February 13,

1799, the United States Senate ratified the 1798 state treaty. It did so in direct and sparse language:

> *Resolved* (two-thirds of the Senators present concurring therein), That the Senate do advise and consent to the ratification of the treaty made on behalf of the State of New York, with the Oneida Indians, on the first day of June 1798.

The Secretary was ordered to lay this resolution before the President of the United States. *See* I *Journal of the Executive Proceedings of the Senate* 312 (1828 ed.), excerpt of that date attached hereto as Appendix A.

Essentially the same events transpired in 1802. The treaty recited the presence of a United States Commissioner and the state employed survey lines drawn in previous transactions in the metes and bounds description. J.A. 38a. Again, no reference by name was made to the 1795 transaction and the Congress ratified the treaty in substantially the same language as that quoted above. *See* I *Journal of the Executive Proceedings of the Senate* at 428, excerpt of that date attached hereto as Appendix B.

Congress' language approving the 1798 and 1802 treaties makes no reference to the existence of the 1795 transaction, much less to its validity. The text of the later state treaties themselves makes no direct reference by date, name, or other recognizable expression, to the 1795 transaction. To be sure, it can be determined from extrinsic evidence that the "last purchase" referred to in 1798 and "lands heretofore ceded" mentioned in 1802 indeed meant the 1795 transaction. However, there is no indication that either the United States Commissioners attending those treaties or the Senate when ratifying them had that extrinsic evidence before them at the time. In short, Congress approved the two later state treaties in complete

ignorance that its acts might have referred to or implicated the 1795 transaction.

Even were the state's language imputed to Congress and Congress presumed to have constructive knowledge that that language referred to the 1795 transaction, ratification does not follow. The later state treaties referred only to survey lines drawn to mark off the land purportedly purchased in 1795. Adoption of survey lines evidences only the location of land, not title thereto. *Gibson v. Chouteau*, 39 Mo. 536 (1867), *appeal dismissed*, 78 U.S. (8 Wall.) 314. Congressional references to boundary locations, particularly such oblique references, do not constitute ratification of the state's claim of title to the property in question. *Seneca Nation*, *supra*.

The counties' and state's ratification argument is simply too manufactured to reflect Congress' actual intent. It depends on language imputed to Congress, constructive knowledge of the hidden meaning of that language, and implications from that hidden meaning. Had Congress actually intended to ratify the 1795 transaction, it would have done so by the same means it employed in 1799 and 1802, *i.e.* by a direct, simple statement. No intent to ratify the 1795 transaction can be found in the counties' construction.

IV. The Oneidas' Claim Is Not Barred By Any Statute Of Limitations

In 1982, the Congress for the first time explicitly provided that tribal actions founded in contract and tort are governed by the same federal statute of limitations that governs such claims filed by the United States on the

tribes' behalf. 28 U.S.C. §2415(a) and (b).[39] Section 2415 expressly does not "limit the time for bringing an action to establish the title to, or right to possession of, real or personal property." §2415(c). Congress could easily have limited title claims by tribes or by the United States on behalf of tribes. Nothing in §2415 or its legislative history indicates that Congress failed to do so in reliance on the applicability of state statutes of limitations to such claims. Rather, just as clearly as Congress intended to treat the United States and tribes identically with respect to contract and tort claims, Congress intended that title claims filed by tribes or the United States on their behalf would not be barred by any statute of limitations. 691 F.2d at 1084.

Section 1362 further indicates that tribal claims should be treated the same as suits filed by the United States with respect to the applicable statute of limitations. This statute granted tribes direct access to federal court specifically to litigate land claims that could have been brought by the United States on their behalf. H.Rep. 89-2040, 89th Cong. 2d Sess. 1-3 (1966). It also reflects Congress' intent that as to such claims, a tribe be placed in the same position as its trustee the United States at least in certain

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[39]Even before the 1982 amendment to section 2415 made its applicability to tribes indisputable, the statute had been construed as applying to tribes as well as the United States. See Capitan Grande Band of Mission Indians v. Helix Irrigation District, 514 F.2d 465, 469-70 (9th Cir. 1975), construing section 2415 as originally enacted in 1966 (Act of July 18, 1966, Pub. L. 89-505, 80 Stat. 304) and as amended in 1972 (Act of July 18, 1972, Pub. L. 92-353, 86 Stat. 499). The same statute was extended in 1977 (Act of July 11, 1977, Pub. L. 95-64, 91 Stat. 268) and 1980 (Act of March 27, 1980, Pub. L. 97-365, 94 Stat. 126) before being made explicitly applicable to tribal claims in 1982.

respects. It is undisputed that a suit identical to this one by the United States on the Oneidas' behalf would not be barred by any statute of limitations. By virtue of §1362, neither should the Oneidas' suit be barred. *See Moe v. Salish and Kootenai Tribes, supra* at 472-74.

In addition, Congress has specially exempted New York tribes from application of any state statute of limitations. In 25 U.S.C. §233, the laws of New York were made inapplicable to "civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952." That statute shows a plain congressional intent that suits such as this be free of state law defenses. *See Oneida* I at 679-82.

Finally, examination of the legislative policy of the Trade and Intercourse Act—a policy cutting directly across state interests (*Oneida* I at 667-78; *Schaghticoke Tribe of Indians v. Kent School Corp., supra,* 423 F. Supp. at 784), demonstrates the necessity for federal pre-emption of the state statute of limitations. *See White Mountain Apache Tribe v. Bracker, supra* at 133-34.

In 1795, the Oneidas could not independently sell tribal lands to the State of New York. The nonintercourse provision of the 1793 Act prohibited such transactions. In thus protecting Indian land, section 8 advanced the sovereign interest of the United States to maintain "peace and friendship" with the Indian tribes and, as trustee, to shield the tribes from improvident dispositions of their lands. *See* discussion infra, p. 25. With particular respect to the Oneidas, the United States also had a sovereign inter-

est to guarantee the Treaty of Canandaigua confirmation of Oneida title to the lands involved in the 1795 state purchase.

In seeking to establish title to the lands taken by the state in 1795, the Oneidas assert not only their own rights "but the sovereign claims of the United States as well." *Schaghticoke Tribe of Indians v. Kent School Corp.*, 423 F. Supp. at 784; *see also Heckman v. United States*, 224 U.S. at 437-38. Consequently, the passage of time should not bar the Oneidas from obtaining judicial remedy in circumstances where the United States, if it were to bring suit on behalf of the Oneidas, would not be subject to a statute of limitations defense. *Narragansett Tribe of Indians v. Southern R.I. Land Develop. Corp., supra*, 418 F. Supp. at 805-06. A contrary conclusion would effectively enable the counties to claim title to Oneida lands without the requisite federal consent. *See Oneida* I at 667-68 (tribal possessory rights in land can be terminated only by sovereign act of the United States and, absent consent of the United States, state law cannot be invoked to limit such rights); *Wilson v. Omaha Indian Tribe*, 442 U.S. at 673, (state law should not be borrowed as the federal rule of decision if there is a "likelihood of injury to federal trust responsibilities or to tribal possessory interests" and where, as here, the tribes would only lose by the adoption of state law); *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367 (1977) ("State limitations periods will not be borrowed if their application would be inconsistent with the underlying policies of the federal statute").

Every court that has examined the applicability of state statutes of limitation to tribal land claims has concluded that the claims are not barred by such statutes.[40] These precedents are soundly premised and should be followed.[41]

V. The Oneidas' Claim Does Not Present Non-Justiciable Political Questions

The political question doctrine has no bearing on this case.[42] "The nonjusticiability of a political question is

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[40]In addition to the courts below, 719 F.2d at 537-38 and 434 F. Supp. at 541-43, *see, e.g.*, Catawba Indian Tribe of South Carolina v. South Carolina, 718 F.2d 1291, 1300 (4th Cir. 1938) *rehearing granted* Dec. 20, 1983; Cabazon Band of Mission Indians v. City of Indio, Calif., 694 F.2d 634, 638-39 (9th Cir. 1982); Oneida Indian Nation of New York v. State of New York, 691 F.2d at 1083-84; Mohegan Tribe v. Connecticut, 638 F.2d at 614-15 & n.3; United States v. Schwarz, 460 F.2d 1365, 1371-72 (7th Cir. 1972); United States v. Ahtanum Irrigation District, 236 F.2d 321, 334 (9th Cir. 1956); United States v. 7,405.3 Acres of Land, 97 F.2d 417, 422-23 (4th Cir. 1938); Cayuga Indian Nation of New York v. Cuomo, 565 F. Supp. at 1301-02; Schaghticoke Tribe of Indians v. Kent School Corp., 423 F. Supp. at 783-85; Narragansett Tribe of Indians v. Southern Rhode Island Land Develop. Corp., 418 F. Supp. at 803-06. *And see* Ewert v. Bluejacket, *supra*, 259 U.S. at 138, and United States v. Forness, 125 F.2d 928, 932 (2nd Cir. 1942), *cert. den. sub nom.* City of Salamanca v. United States, 316 U.S. 694 (1942).

[41]Amici argue, referring to Felix v. Patrick, 145 U.S. 317 (1892), that laches also applies to bar this suit. Since the counties abandoned the laches defense on appeal, it is not before this Court. *See infra*, n. 2. In any event, the *Felix* case would not bar the Oneidas' claim. Given its broadest reading, *Felix* indicates only that laches may preclude certain remedies as against innocent third parties, but not bar the claim itself. Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324, 1333 (10th Cir. 1982). Even had the counties' good faith been established, the Oneidas would further be entitled to stand in the stead of the United States and avoid the limitation on remedies applied in *Felix*. *See* 28 U.S.C. § 1362.

[42]In *Oneida* I this Court implicitly concluded that the Oneidas' claim was justiciable. Justiciability is a jurisdictional issue that can be raised *sua sponte* by the Court. Poe v. Ullman, 367 U.S. 497, 508 (1961). In 1974, the issue of justiciability was not raised by the Court or the parties.

primarily a function of the separation of powers." *Baker v. Carr,* 369 U.S. 186, 210 (1962). It involves "the relationship between the judiciary and coordinate branches of the Federal Government." *Id.*

The Oneidas challenge, as a violation of federal law, the title to land of two political subdivisions of the State of New York. The purported title of these political subdivisions was acquired without the involvement of any branch of the Federal Government and the violation can be remedied without such involvement. In these circumstances, there is "no question decided, or to be decided, by a political branch of government coequal with this Court." *Id.* at 226. Therefore, federal judicial review and remedy of the challenged acts are permissible.

A. The Issues Raised by the Oneidas' Claim Have Not Been Constitutionally Committed to a Coordinate Political Branch.

The counties maintain that in section 5 of the 1793 Act and in Article VII of the 1794 Treaty of Canandaigua, the Congress delegated to the President exclusive discretionary authority to remedy the Oneidas' claim. County Petitioners' Br. 45-47. The argument is erroneous. Under the political question doctrine, only issues committed to a coordinated branch by the text of the Constitution are non-justiciable. *Baker v. Carr,* 369 U.S. at 211, 217; *Gilligan v. Morgan,* 413 U.S. 1, 6 (1973).

Even accepting *arguendo* the counties' unprecedented expansion of the political question doctrine, neither section 5 of the 1793 Act or Article VII of the Treaty of Canandaigua preclude tribal action in federal court to enforce title rights guaranteed by the Treaty and protected by the Act. The Indian Commerce Clause is the only textual commitment in the Constitution of authority over Indian affairs. U.S. Const., art. I, sec. 8, cl. 3. Its purpose is to benefit tribes by interposing the protective jurisdiction of the federal government "as a shield to protect Indian tribes from state and local interference." *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 153-54 (1982). Pursuant to that authority, Congress enacted the nonintercourse provision as part of the 1793 Act which bestowed certain federal rights on Indian tribes respecting tribal lands. *See* discussion *infra,* p. 25. Since the Oneidas seek only to vindicate a federally protected right, the action does not require that the Court intrude into a matter committed by the Constitution to a coordinate branch of government. *Baker v. Carr,* 369 U.S. at 231.

The counties' reliance on Article VII is similarly misplaced. By reciting that "peace and friendship" are the object of Article VII, and by its reference to "misconduct of individuals," and later to the "offender," Article VII clearly refers to criminal or quasi-criminal acts of individuals calculated to breach the peace and undertaken without claim of right or authority.

In contrast, the state purchase of Oneida land in 1795 was concluded by state officials acting under color of state law. The purchase did not constitute the "individual misconduct" contemplated by Article VII.[43]

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[43]Even if Article VII were construed to encompass misconduct of the State of New York and its political subdivisions, there is no indication that Article VII remedies were intended to be exclusive. Article VII does not authorize the President to settle land title disputes nor does it bar actions in federal court

(Continued on next page)

B. The Oneidas' Claim is Not Barred by Any Decision or Policy Determination of the Political Branches.

In 1968, the Oneidas requested the Department of the Interior to bring suit against the State of New York to remedy the State's alleged unlawful taking of Oneida lands between 1788 and 1842. J.A. 42a-44a. The Commissioner of Indian Affairs, in declining the request, stated that litigation of the Oneidas' claims by the federal government "seems unnecessary" since the Oneidas could obtain compensation through the Indian Claims Commission. *Id.* The counties urge that the Commissioners' 1968 letter constitutes an executive decision or policy determination that forecloses judicial action by the Oneidas in the federal courts.

The counties fail to identify any required "adherence to a political decision already made" or an "initial policy determination of a kind clearly for nonjudicial discretion" that implicates separation of powers principles. Judicial resolution of the Oneidas' claim does not involve the federal courts in matters committed to the President or Congress. For this reason, judicial determination of title to property based upon construction of a statute or Indian treaty has always been treated as justiciable. *Washington v. Washington State Commercial Passenger Fishing*

(Continued from previous page)

to enforce property rights guaranteed by federal treaty. If Congress had intended to vest the Executive with exclusive authority over such matters, it would have done so explicitly. Herd & Co. v. Krawill Machinery Corp., 359 U.S. 297, 304 (1959); In the Matter of Kang-gi-Shin Co. (Crow Dog), 109 U.S. 556, 572 (1883).

Vessel Ass'n., 443 U.S. 658, 674-79 (1979); *United States v. Shoshone Tribe*, 304 U.S. at 116-17; *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 746-47 (1838); *Oneida Indian Nation of New York v. State of New York*, 691 F.2d at 1081-83; *Narragansett Tribe of Indians v. Southern R.I. Land Devel. Corp.*, 418 F. Supp. at 815. Such determinations do not usurp authority of the political branches. Rather, they assure that the intent of Congress, in providing statutory and treaty rights, will be respected. *Baker v. Carr*, 369 U.S. at 215 n.43.[44]

Finally, the justiciability of the Oneidas' claim is underscored by several acts of Congress that clearly contemplate federal court resolution of such claims. *See* 25 U.S.C. § 194; 25 U.S.C. § 233; 28 U.S.C. § 1362; and 28 U.S.C. § 2415(c).[45]

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[44]The counties also overlook the fact that the 1968 letter was not the executive branch's last word on the matter. In 1977, the Department of Interior asked the Department of Justice to litigate this claim on the Oneidas' behalf. *See* Appendix C attached hereto. The Department of Justice declined to do so expressing its preference for negotiated settlements in these cases. *See* Brief of Amici Curiae City of Escondido, etc., n.15. Thus, the executive branch has not finally determined that the Oneidas should be relegated to a monetary claim against the United States.

[45]The counties suggest that the Oneidas' claim is nonjusticiable because of internal disputes among and within the plaintiff tribes. Since the Oneida parties in this suit have always taken a consistent and mutually supportive position in this litigation, it is not at all clear to which disputes the counties refer. Just as non-Indian governments have internal political controvercies, so do tribal governments. Any such internal differences do not affect the Oneida tribes' right to recover. 434 F. Supp. at 533.

CONCLUSION

The judgment of the Second Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX A

WEDNESDAY, FEBRUARY 13, 1799.

The Senate proceeded to consider the report of the Committee to whom was referred the treaty made with the Oneida Indians, on behalf of the State of New York;

And, on the question to advise and consent to the ratification of the said treaty, as reported by the Committee,

It passed unanimously in the affirmative, ...Yeas, 25.

The yeas and nays being required by one-fifth of the Senators present.

Those who voted in the affirmative, are—Messrs. Anderson, Bingham, Bloodworth, Brown, Chipman, Davenport, Foster, Goodhue, Greene, Gold, Hillhouse, Howard, Langdon, Latimer, Livermore, Lloyd, Marshall, Martin, Paine, Ross, Sedgwick, Stockton, Tracy, Watson, and Wells.

Resolved, (two-thirds of the Senators present concurring therein,) That the Senate do advise and consent to the ratification of the treaty made on behalf of the State of New York, with the Oneida Indians, on the first day of June, 1798.

Ordered, That the Secretary lay this resolution before the President of the United States.

The Senate proceeded to consider the message of the President of the United States, of the 9th instant, and the nominations contained therein, and Timothy Taylor, and others, to office. Whereupon,

Resolved, That they do advise and consent to the appointments, agreeably to the nominations respectively.

Ordered, That the Secretary lay this resolution before the President of the United States.

APPENDIX B

FRIDAY, DECEMBER 31, 1802.

The treaty made under the authority of the United States between the State of New York and the Seneca nation of Indians, at Albany, thence day of August, 1802, was considered; and, on the question, Will the Senate advise and consent to the ratification thereof?

It was determined, unanimously, in the affirmative: Yeas 20.

Those who voted in the affirmative, are—Messrs. Baldwin, Bradley, Breckinridge, Clinton, Cocke, Dayton, Ellery, T. Foster, D. Foster, Franklin, Hillhouse, Jackson, J. Mason, Morris, Ogden, Olcott, Plumer, Sumpter, Tracy, and White.

So it was

"*Resolved,* (two-thirds of the Senators present concurring therein,) That the Senate do advise and consent to the ratification of the treaty, made under the authority of the United States, between the State of New York and the Seneca nation of Indians, the 20th day of August, 1802."

Ordered, That the Secretary lay this resolution before the President of the United States.

The treaty made under the authority of the United States between the State of New York and the Oneida nation of Indians, at their village, on the 4th day of June, 1802, was considered; and, on the question, Will the Senate advise and consent to the ratification thereof?

It was determined, unanimously, in the affirmative: Yeas 20.

Those who voted in the affirmative, are—Messrs. Baldwin, Bradley, Breckinridge, Clinton, Cocke, Dayton, Ellery, T. Foster, D. Foster, Franklin, Hillhouse, Jackson, J. Mason, Morris, Ogden, Olcott, Plumer, Sumpter, Tracy, and White. a

So it was

"*Resolved,* (two-thirds of the Senators present concurring therein, That the Senate do advise and consent to the ratification of the treaty, made under the authority of the United States, between the State of New York and the Oneida nation of Indians, on the 4th day of June, 1802."

Ordered, That the Secretary lay this resolution before the President of the United States.

The treaty of limits, between the United States and the Creek nation of Indians, made near Fort Wilkinson, June 16th, 1802, was read the second time.

APPENDIX C

DEPARTMENT OF THE INTERIOR

news release

OFFICE OF THE SECRETARY

For Release July 1, 1977

INTERIOR ASKS DEPARTMENT OF JUSTICE TO BRING SUITS IN SUPPORT OF INDIAN CLAIMS IN NEW YORK STATE

Interior Department Solicitor Leo M. Krulitz announced today that on June 29 the Department made a final recommendation to the Justice Department to bring actions on behalf of three Indian tribes to recover lands in New York State. The Justice Department has agreed to bring the suits. Two claims were first referred to Justice in 1975 and the third was initially referred in 1976.

The proposed suits would be similar to actions now pending on behalf of the Passamaquoddy and Penobscot Indians with regard to land claims in the State of Maine. The New York suits would be based on the view that the lands involved were ceded to the State in treaties not authorized or formally participated in by the United States as required by the Indian Nonintercourse Act of 1790. The suits would seek ejectment and damages against those persons claiming an interest in the lands.

The three tribes involved are: the St. Regis Mohawk Tribe with a land claim of about 10,500 acres; the Cayuga Tribe with a land claim of about 62,000 acres; and the Oneida Nation with a claim of about 200,000 acres.

"The position which we are now taking on behalf of the tribes is that, as a matter of law, the United States should pursue their claims," Krulitz said. "However, we realize that the filing of a complaint may have an adverse

effect on land transactions in the claimed areas and meetings have been held with the tribes and representatives of New York State to discuss alternatives to litigation."

Krulitz said portions of the claims would be barred if suits aren't filed by Aug. 18. A bill is pending in Congress which would extend the deadline. "Extension of the deadline would provide time to see if some alternative other than litigation can be found to resolve these claims," Krulitz said.

The land claim areas are as follows:

Oneida:

The lands are generally located in Madison and Oneida Counties and border the southeast sector of Oneida Lake. Completely within the area are nine townships (Vernona, Vernon and Augusta Townships in Oneida County; Stockbridge, Oneida, Lennox, Lincoln, Smithfield, and Fenner in Madison County) and seven villages (Oneida Castle, Sherill and Vernon in Vernon Township; Oneida in Oneida Township; Munnsville in Stockbridge Township; and Canastota and Wampsville in Lennox Township). Parts of two townships (Sullivan and Cazenovia) and two villages (Chittenango and Cazenovia) are also within the area.

Cayuga:

The lands are generally a three-mile wide strip surrounding the northern half of Cayuga Lake. The boundary between Cayuga and Seneca Counties dissects the lake so that about half the lands lie in each county. The southeasterly portion of the town of Seneca Falls is within the area.

St. Regis Mohawk:

The lands lie in both Franklin and St. Lawrence Counties. They include the lands immediately on the East of the present eastern boundary of the reservation to the town of Fort Covington. Two square miles are included in the towns of Fort Covington and Massena. The

triangular shaped area cutting the overall rectangular shape of the present reservation boundaries is involved, which includes the town of Hogansburg. Also included are the meadow lands along the Grass River and Barnhart and Baxter Islands in the St. Lawrence River.

• • •

(SEAL)

UNITED STATES
DEPARTMENT OF THE INTERIOR

OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

June 30, 1977

IN REPLY REFER TO:

Mr. James W. Moorman
Acting Assistant Attorney General
Land and Natural Resources Division
Department of Justice
Washington, D.C. 20530

Dear Mr. Moorman:

This is in response to your letter dated February 25, 1977, requesting a clarification of our recommendation of litigation on behalf of the Oneida Nation of Indans to recover land disposed of in violation of the Indian Non-intercourse Act, 25 U.S.C. § 177.

We now request that the relief to be sought in the proposed litigation be 1) a declaratory judgment that the treaties which conveyed Oneida lands to New York State that were not ratified by the United States are void; 2) ejectment of all persons claiming a right to the present possession of the lands; and 3) money damages representing all rents, profits and issues accruing to the defendants during the time of their possession.

The involved lands were reserved to the Oneida Tribe of Indians in the Treaty of September 22, 1788, with New

York State. They consist of a contiguous tract of 231,-310.81 acres. In the Treaty with the Six Nations of November 11, 1794, 7 Stat. 44, the United States confirmed three of the tribes of the Iroquois confederacy, including the Oneida, in the lands that had been reserved to them in their treaties with the State. In 25 subsequent treaties all of the reserved lands, except for 757.42 acres, were ceded to the State. It is our position that the conveyances made in 23 of those treaties were in violation of the Indian Non-intercourse Act and Indian title today is paramount with respect to those lands.

As with our recommendation on behalf of the Cayuga tribe in connection with their treaty with the State of February 26, 1807,[1] we have reached no firm conclusion on the validity of two Oneida treaties in which a United States Commissioner was present, where the treaty was under the authority of the United States, it was executed with the Commissioner's approbation, and the Commissioner was appoitned to hold the same. The two treaties are one of June 1, 1798, in which 36,650 acres were ceded and another of March 15, 1802 in which 11,634.50 acres were ceded. See Findings of Fact Nos. 7 and 8, 26 Ind. Cl. Comm. 151-152.

The Act of March 1, 1793, 1 Stat. 329, 330, includes a proviso which allows states to acquire lands but only through the means of a treaty. Since states cannot enter into treaties, U.S. Const., Art. 1, Sec. 10, Cl. 1, a treaty ratified by the Senate, as required by Art. 2, Sec. 2, Cl. 2, would seem to have been the only means of acquiring Indian lands until the year 1871 when treaty-making was ended by Congress, Act of March 3, 1871, 16 Stat. 566, 25 U.S.C.

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[1]Letter dated November 11, 1976 from Solicitor Austin to Assistant Attorney General Taft.

§ 71. Furthermore, the original Non-intercourse Act provision states that a cession must be " . . . by treaty or convention entered into pursuant to the Constitution." The 1793 amendment uses the term "treaty" twice. The connotation of the term in the amendment must be the same as in the original; thus, requiring Senate ratification, notwithstanding the fact that the treaty may in actuality be between the state and tribe. *See, e.g.,* Treaty with the Seven Nations of Canada, May 31, 1796, 7 Stat. 55. While the State Court opinion in *Seneca Nation v. Christy,* 27 N.E. 275 (1891), asserts that a state may enter into a treaty with an Indian tribe and that congressional ratification of a state treaty is not a prerequisite to its validity, 27 N.E. at 277, 279-80, the Supreme Court expressly abstained from expressing its views on the issue, and dismissed the writ of error, 162 U.S. 283 (1896). Therefore, the question may be one of first impression. However, at this time we believe that more research is warranted. We will endeavor to promptly advise you of our final positions before litigation is commenced.

The lands are involved in the proceeding by the Oneida Nation before the Indian Claims Commission, Docket No. 301, Claims 3-8, in which Findings of Fact and Conclusions of Law were entered August 18, 1971, 26 Ind. Cl. Comm. 138. See Findings of Fact Nos. 6-28, 26 Ind. Cl. Comm. 150-162. There is presently pending a settlement which is to result in the payment of $3.3 million for claims 1 and 2 involving lands affected under pre-1970 dispositions and dismissal with prejudice of claims 3-7. (Claim 8 was voluntarily dismissed by the plaintiff several years ago.)

We recommend that litigation be initiated on behalf of the Oneida Nation of Indians. There are three constituent

groups of Oneidas located in New York, Wisconsin and Ontario, Canada. We are unsure whether the Oneida of the Thames at Southwold, Ontario have a legal claim to the New York lands as do the other groups. However, we think it is adequate for present purposes to identify the beneficiary of our trust responsibilities as the "Oneida Nation of Indians."

The lands, as mentioned above, form a contiguous tract as depicted on the map prepared by Cadastral Survey of the Bureau of Land Management for the Indian Claims Commission Docket No. 301 proceeding. Enclosed is a copy of the map prepared in March 1967 and revised in August 1973. In the Treaty of September 22, 1788 with the State, New York reserved an area of 231,310.18 acres for the exclusive use of the Oneidas. In addition, New York agreed " . . . there shall forever remain ungranted [within the area ceded] . . . one half mile square at the distance of every six miles of the lands along the northern banks of the Oneida lake, one half mile of the lands on each side of the Fish Creek, and a convenient piece of land at the fishing place in the Onondaga River about three miles from where it issues out of the Oneida Lake, and to remain as well for the Oneidas and their posterity as for the inhabitants of said State to land and encamp on." In the treaty, the Oneidas also ceded land to the New England Indians settled at Brotherton, to the East of the area, and the Stockbridge Indians. The tract ceded to the Stockbridge is six miles square and is located within the reserved lands.

It appears from the language of the 1788 treaty that the Oneidas were not reserved a present exclusive right of occupation in the one-half mile at every six miles along the

northern lake bank, along Fish Creek and at a place on the Onondaga River. The 1794 Treaty with the Six Nations merely acknowledged the "lands reserved to the [three Indian] Nations, . . . and called their reservations. . . ." and, possibly, had no effect on the lands New York agreed would remain ungranted. A party seeking ejectment must have a present right to possession paramount to the person against whom it is sought. Since it is unclear that the Indians do have such a paramount right, we recommend at this time that such lands not be included in those from which ejectment is sought. Nevertheless, we are of the view that any grant of these lands by the State after the year 1790 would have required the approval of the United States because of the reservation of the lands in the Oneidas. It appears that all but the place on the Onondaga River were later granted. Since to our knowledge no such approval was obtained, the dispositions would similarly be void. We believe that the question of the Indians' interest and the effect of a subsequent grant of the lands by the State are appropriate for declaratory judgment relief. Because surveys and title searches would be required to describe the lands and to identify each potential defendant claiming an interest in them, unlike the simplified method we propose below for identifying the defendants within the reserved area, we will defer recommending litigation on this matter until each person claiming an interest in the lands is identified.

There are eleven townships and nine villages within the 1788 treaty area. Of these, nine townships and seven villages are completely within the reserved area and two townships (Sullivan and Casanovia) and two villages (Chittenango and Casanovia) are partly within and partly outside

the area. Excluding the Stockbridge reservation, seven townships and six villages are completely within the reservation area. If the Stockbridge reservation lands and those affected by the 1798 and 1802 treaties are excluded, there are four complete townships and four villages within the area. Lists are available at nominal costs of all persons within the townships and villages assessed property taxes. We will obtain these lists and propose using these as the basis for naming the defendants.

We recognize that by not naming each party defendant by July 17, 1977—the date the statute of limitations for money damages, 28 U.S.C. §2415, runs—that we are foreclosing obtaining pre-1966 money damages against them. However, the statute of limitations may be extended so as to allow time for the naming of each defendant. But under the circumstances, using the lists of those assessed property taxes is the only feasible way of identifying defendants.

We have met with officials of the Oneida Nation to explore with them the possibility of a resolution of their claims apart from litigation. While we expect to hold further meetings with them, we cannot at this time predict whether such discussions will be fruitful. We are, however, committed to pursuing their claims through litigation.

We urge that you act with all speed in readying a complaint for filing before July 18. We stand ready to assist you and to furnish you any additional information you deem necessary. We believe that the lists we will furnish you with can be used as the basis for filing the complaint so as to toll the running of the statute of limitations. There

is no requirement by way of statute, Federal Rules of Civil Procedure or local rules of the District Court for the Northern District of New York that the complaint name each defendant. Thus, the complaint may be filed attaching the list of persons and the action will have been commenced. Rule 3, Fed. R. Civ. P. Service of the summons and complaint can then follow.

Sincerely,

LEO M. KRULITZ
Solicitor

bcc: Solicitor Docket File
Secretary reading file (2)
DJones file (2)
RBuckner file
DIA reading file
Hold copy

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